



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004089
First-tier Tribunal No:
IA/16071/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 16 March 2023**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Nishan Rai
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr R Rai instructed by Sam Solicitors

For the Respondent: Mrs R Nolan, Home Officer Presenting Officer

Heard at Field House on 25 January 2023

DECISION AND REASONS

1. The appellant appeals, with permission, against a decision of First-tier Tribunal (“FtT”) Judge Parkes (“the judge”) promulgated on 21st June 2022 which dismissed the appellant’s appeal.
2. The appellant, a citizen of Nepal born on 8th July 1983, had made an application on 31st July 2021 for entry clearance as the adult dependant of his father, (“the sponsor”), who is a former Gurkha

soldier. The appellant appealed the Entry Clearance Officer's refusal dated 5th October 2021.

3. The sponsor attended the hearing before the First-tier Tribunal and gave oral evidence.
4. The grounds for permission to appeal to the Upper Tribunal asserted the judge materially erred in law because there was
 - (i) an error in the factual evidence
 - (ii) speculation in respect of the appellant's contact with his mother
 - (iii) failure to assess the substance of the relationship.

(i) when referring to the appellant as not having '*a regular job but sometimes works 1 or 2 days for pocket money picking rubbish or things like that*' the judge erred in considering that the appellant had an income to sustain his livelihood. The judge at [16] accepted that the sponsor provided financial support.

(ii) the judge speculated as to whether the appellant was still in contact with his mother. The appellant's evidence was that he was not in contact with his mother. The sponsor's evidence echoed this in stating that the sponsor had not been in contact with his ex-wife for years.

(iii) there was a lack of assessment on the substance of the appellant's relationship with his father. The decision was contrary to the Court of Appeal's decision in Gurung and Ors R (on the application of) v Secretary of State [2013] EWCA Civ 8.

5. Permission to appeal was granted by UTJ Jackson on the basis that it was arguable the judge had not addressed the real issue which was whether the appellant had established family life with the sponsor for the purposes of Article 8(1) under the European Convention on Human Rights when he left Nepal and whether that had endured. There was no reference to the leading authority which is Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320.
6. At the hearing Mr Rai relied on his written grounds. Although Mrs Nolan valiantly attempted to defend the judge's decision, she acknowledged that the judge had not engaged adequately with the appellant's bundle and submitted that the matter should be returned to the FtT. Mr Rai agreed.

Analysis

7. I consider ground (iii) first as this is at the heart of the appeal. The judge made various findings from [12] to [17]. These included that

since coming to the UK in 2008 the Sponsor had returned only twice to Nepal and that he and the appellant had not lived together since 2008, when the appellant was very nearly 26 years old[12]. The judge reasoned at [13] *'the separation was not related to education or similar purposes'* and added

'There is effectively no evidence about the appellant's circumstances and life in the period after the Sponsor's departure for the UK with his second wife and family' [13]

At [15] the judge found

'It is surprising that the appellant would not maintain contact with the one parent that he has in Nepal [the mother] if there is no other family'.

8. The judge stated at [16]

'I accept that the Sponsor has provided the Appellant with financial support and that they have been in contact with each other as demonstrated in the transfers in the stitched bundle. However that is only part of the evidence and the overall circumstances have to be assessed. I am not satisfied that the evidence presents an accurate picture of the appellant's circumstances in Nepal'.

9. In **Jitendra Rai v Secretary of State for the Home Department [2017] EWCA Civ 320** Lindblom LJ said this:

"17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents ... the irreducible minimum of what family life implies".

...

18. *In Ghising (family life – adults – Gurkha policy) the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in Kugathas had been 'interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts', and (in paragraph 60) that 'some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence'. It went on to say (in paragraph 61):*

'61. Recently, the [European Court of Human Rights] has reviewed the case law, in [AA v United Kingdom [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of

his own. If he is still single and living with his parents, he is likely to enjoy family life with them. ...'.

The Upper Tribunal set out the relevant passage in the court's judgment in AA v United Kingdom (in paragraphs 46 to 49), which ended with this (in paragraph 49):

'49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having 'family life'.'

19. *Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in Gurung (at paragraph 45), 'the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case'. In some instances 'an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents'. As Lord Dyson M.R. said, '[it] all depends on the facts'. The court expressly endorsed (at paragraph 46), as 'useful' and as indicating 'the correct approach to be adopted', the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life – adults – Gurkha policy), including its observation (at paragraph 62) that '[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive'.*

At [39] – [40] it was held in Jitendra Rai:

'... the real issue under article 8(1) in this case, which was whether, as a matter of fact, the appellant had demonstrated that he had a family life with his parents, which had existed at the time of their departure to settle in the United Kingdom and had endured beyond it, notwithstanding their having left Nepal when they did.

40. The same may be said of the Upper Tribunal judge's comment that "[there] is no evidence presented as to why the Appellant alone of the six children appears to have remained both within the family home and without employment" (paragraph 22). Even if this was a fair reflection of the evidence explaining how it had come about that the appellant was now the only child of the family in the family home – which I do not think it was – it does not go to the question of whether, as a matter of fact, the appellant himself still enjoyed a family life with his parents – even if his siblings did not' [my underlining].

10. First, the judge made no mention of Jitendra Rai, one the leading authorities in this area of law and which gives further guidance on the approach to be taken and did not set out the relevant test in relation to family life. Although the failure to cite caselaw is not an error in itself, a self direction on this basis may have avoided the errors identified below

11. The judge failed to apply the correct test in assessing family life as set out above. The judge was obliged to pay attention to the concept of “support” which needed to be “real” or “committed” or “effective”. When assessing family life, there is no requirement for the financial or emotional dependency which constitutes family life to reach an extraordinary or exceptional level. The judge interpreted the evidence in relation to the ‘pocket money’ from collecting rubbish as meaning the appellant was able to work but by contrast also accepted that the appellant had indeed been provided with ‘financial support’ [16]. There was inadequate further analysis. Sedley LJ in Kugathas at [17] held, it is the support that elevates “normal” ties in the sense of “mere” or “ordinary” emotional ties into ones protected by Article 8.
12. Second, the judge states at [13] that there was effectively no evidence about the appellant’s circumstances and life in the period after the sponsor’s departure for the UK but failed properly to engage with the bundle of evidence provided which included witness statements, certificates and remittance evidence.
13. Third, the judge concentrated on whether the appellant had a relationship with his mother in Nepal, without concentrating on whether there was a family life with the sponsor, and which was the issue. Paragraphs [14]–[15] were essentially on the appellant’s relationship with his mother and did not adequately explain why even if the judge did not accept the evidence from both the appellant and sponsor that there was an absence of contact that should exclude a relationship with the father.
14. Fourth, the judge stated that he was *‘not satisfied that the evidence presents an accurate overall picture of the appellant’s circumstances’* [16] but did not explain why or give reasoning on this point when he had not engaged adequately with the evidence that had been provided as highlighted above.
15. Fifth, the judge factored in that there was almost no direct personal contact without factoring in that, notwithstanding the financial constraints, the reason is in part, quite evidently, owing to historical injustice. The question of whether an individual enjoys family life is one of fact and depends on the careful consideration of all the relevant circumstances and the relevant elemental factors.
16. Owing to the errors identified above I find that, on ground (iii), the judge erred in the approach to the assessment of family life. As this is fundamental, I have not addressed the first two grounds in detail. Both representatives submitted that in the event I found an error of law the matter should be remitted back to the First-tier Tribunal owing to the extent and nature of findings to be made.

Notice of Decision

17. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Helen Rimmington

Judge of the Upper Tribunal
Rimmington

Immigration and Asylum Chamber